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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK R. SWIATEK,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT OR ALTERNATIVE RELIEF

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QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated when the United States Court of Appeals for the Seventh Circuit failed to address the issue raised on appeal and based its decision on misstatements of the evidence adduced at trial.

2. Whether petitioner's due process rights were violated because the statute under which he was convicted, 21 U.S.C. § 841(a)(1), was unconstitutionally vague as applied to petitioner, a seventy-seven year old retired physician lacking any motive to improperly distribute a controlled substance, where the evidence of misconduct was marginal, at best, and the jury never was adequately informed as to what constitutes the distribution of phendimetrazine outside the scope of legitimate medical practice.

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In The

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October Term, 1982

FRANK R. SWIATEK,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT OR ALTERNATIVE RELIEF

Frank R. Swiatek, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 6, 1982 or, in the alternative, that this cause be remanded to that court with instructions to decide the issue previously raised on appeal.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit affirming petitioner's conviction is unreported. That unreported order is attached hereto as Appendix A.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on December 6, 1982. A petition for rehearing was timely filed and was denied on January 18, 1983. A copy of the order denying the petition for rehearing is attached hereto as Appendix D. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V

> No person shall . . . be deprived of life, liberty or property, without due process of law;

21 U.S.C. § 841(a)(1)

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Schedule of Controlled Substances, 21 C.F.R. § 1308

> See: Appendix B (attached)

STATEMENT OF THE CASE

Petitioner, Dr. Frank R. Swiatek, was charged in a seven-count indictment filed October 3, 1981, in the Northern District of Illinois, Eastern Division, with violations of Section 841(a)(1) of Title 21, United States Code. All seven counts charged petitioner, a physician licensed to practice medicine in the State of Illinois, with distributing tablets containing phendimetrazine, a Schedule III Controlled Substance, not in the course of defendant's professional practice. Jury verdicts of guilty were reached on all counts. (R. 532.) Defendant's post-trial motions for judgment of acquittal and new trial were denied. (Sentencing Hearing Tr. at 8.) On March 24, 1982, final judgment was entered against defendant. Regarding Counts One through Four, it was ordered that defendant be imprisoned for a term of ninety days followed by a special parole term of eight years, sentences to run concurrently. It was further ordered that defendant pay a fine of $15,000 on Counts One through Four for a cumulative total of $60,000. Imposition of a sentence of imprisonment was suspended with respect to Counts Five through Seven and defendant was placed on probation for a period of five years to run concurrently with the special parole term imposed on Counts One through Four. In addition to the general conditions of probation, defendant was ordered to render community service in the amount of 125 hours per calendar quarter for each of the first two years during the period of probation. (App. E.)

STATEMENT OF THE FACTS

Dr. Frank Swiatek, who was seventy-seven years old at the time of trial, practiced general medicine in the neighborhood where he was born from 1935 until his retirement in 1981. (R. 425-426.) As part of his practice, Dr. Swiatek treated patients for weight control. By 1979 and 1980, this treatment comprised approximately twenty percent of his practice. (R. 437.)

Dr. Swiatek used medication as part of his weight control program. (R. 437-438.) Originally, he used amphetamines but when they became classified as a Schedule II drug in 1973, thus requiring extensive record keeping, Dr. Swiatek began prescribing phendimetrazine, a Schedule III controlled substance, the distribution of which did not require that records be kept. (R. 438, 440-441.) Prior to the time when he sold his practice, Dr. Swiatek charged $5.00 for a box of sixty pills. There was no charge for the office visit. (R. 442, 450.) In addition to the drug, Dr. Swiatek generally gave his weight control patients a menu plan and discussed nutrition. (R. 441-442.)

Initially, Dr. Swiatek performed physical examinations upon patients for whom he prescribed phendimetrazine. After several hundred such examinations, he concluded that the drug produced no ill effects on users' blood pressure, sleep or nerves. He therefore discontinued the physical examinations. (R. 438-439.) Moreover, Dr. Swiatek familiarized himself with the research literature concerning phendimetrazine. He found that the literature was consistent with his opinion that phendimetrazine was a "very, very safe drug." (R. 439-440.)

In May 1980, Dr. Swiatek sold his practice to Dr. James J. O'Donnell. (R. 434.) Thereafter, Dr. Swiatek generally worked at the office two days each week. In December, 1980, Dr. O'Donnell became ill and Dr. Swiatek ran the practice for Dr. O'Donnell until approximately January 15, 1981. Both in July and October, 1981, Dr. Swiatek again ran the office for one week. (R. 435-437.) Dr. Swiatek has not practiced medicine since October, 1981. (R. 436-437.)

During these three weeks when Dr. O'Donnell's practice was operated by Dr. Swiatek, he was visited by a number of law enforcement officers posing as patients. All of the agents appeared to be in good health and not drug abusers. Dr. Swiatek gave phendimetrazine to each of the undercover agents. Dr. Swiatek did not perform physical examinations before dispensing the drug. It was the testimony of Dr. Paul Nauseida, the government's expert, that distributing phendimetrazine under such circumstances was "inappropriate." (R. 265-267.) Dr. Nauseida never said such distribution was outside the scope of legitimate medical practice. Moreover, the defense's expert, Dr. James Gearien, testified that the scientific literature established that phendimetrazine was a safe drug with a very low potential for abuse. (R. 331-333, 337.)

The defense called a number of Dr. Swiatek's medical colleagues as character witnesses all of whom testified to Dr. Swiatek's reputation for honesty and competency as a practitioner. (R. 365, 411, 416.) In addition, several of Dr. Swiatek's former patients testified to the efficacy of his weight control program and the absence of ill effects resulting from that program. (R. 351-353, 370-372, 419-420.)

REASONS FOR GRANTING THE WRIT OR ALTERNATIVE RELIEF

I.

PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, IN AFFIRMING THE CONVICTION, NEVER ADDRESSED THE ARGUMENT RAISED ON APPEAL AND MISSTATED THE EVIDENCE ADDUCED AT TRIAL.

The due process right to a hearing surely must encompass the right to a hearing that is meaningful, not merely a hearing in form but one of substance. Concerning the first appeal of right in the federal system, the due process hearing requirement should include full consideration of and a reasoned judgment upon the issues presented for review.

In the case at bar, petitioner admittedly presented briefs and engaged in oral argument before the Seventh Circuit. Yet the court's opinion impels the conclusion that petitioner's hearing was one of form only. For in affirming petitioner's conviction, the appellate court never addressed the issue raised by petitioner on appeal. Further, the court based its decision upon misstatements of the evidence adduced at trial. As a result, the Seventh Circuit's decision violated petitioner's right to due process.

On appeal, petitioner, a seventy-nine year old retired physician charged with violating 21 U.S.C. § 841(a)(1), argued that neither the Government's evidence nor the trial court's instructions informed the jury as to what constitutes the distribution of phendimetrazine by a licensed physician outside the usual course of profes-

sional medical practice.[1] This was the third element of the offense charged. *See, e.g.: United States v. Rosen*, 582 F.2d 1032, 1033 (5th Cir. 1978). Rather than consider this argument, the Seventh Circuit recast petitioner's claim as one of the sufficiency of the evidence and the propriety of the jury instructions.[2] The court presented the issue in this way even though petitioner never argued in terms of sufficiency. Further, in his reply brief and at oral argument petitioner explicitly stated that he did not seek reversal on the basis of erroneous jury instructions.

The practice of inaccurately stating the issues presented for review has been condemned by members of this Court. For example, in *Gelbard v. United States*, 408 U.S. 41 (1972), a civil contempt proceeding against witnesses before federal grand juries who refused to comply with court orders to testify, the defense was that the grand jury interrogation was to be based upon information obtained from communications allegedly intercepted by federal agents by means of wiretapping and electronic surveillance in violation of 18 U.S.C. § 2515. The majority held that grand jury witnesses are entitled to invoke the prohibitions of § 2515 as a defense to contempt charges for refusal to testify. 408 U.S. at 43.

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[1] In his opening brief to the Seventh Circuit, petitioner said that the issue presented for review was "whether the Government's evidence and the court's instructions informed the jury what constitutes the distribution of phendimetrazine by a licensed physician 'outside the practice' of medicine."

[2] The court framed the issue as follows: "The defendant argues that the government's evidence is insufficient to support a conviction," (Order at 2a.) and "[t]he defendant also contends that the jury was not properly instructed." (Order at 3a.)

Writing for the dissenting justices, Justice Rehnquist criticized the majority for formulating the issues inaccurately. He said that the majority stated the question to be whether witnesses threatened with contempt

> are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusal to testify . . . *The question as thus framed by the court* has been so abstracted and refined, and divorced from the particulars of these two cases, as to *virtually invite the erroneous answer that the opinion of the Court gives.*

408 U.S. at 71. (Emphasis supplied.) In the case at bar, the Seventh Circuit engaged in a similar type of conduct. The court ignored the issue raised on appeal. Instead, the court chose to decide a wholly different question, and to do so in such a way that the outcome, affirmance, would be assured.

The Seventh Circuit insured that petitioner's conviction would be affirmed because, in addition to reframing the issue in terms of sufficiency, in finding the evidence "sufficient" the court misstated the evidence adduced at trial. Thus, beyond addressing issues never raised on appeal, the court's decision was not based upon facts in the record.

It was the Seventh Circuit's conclusion that "the Government witnesses revealed that the defendant's system of dispensing phendimetrazine violated basic standards of the medical community." (Order at 3a.) As will be demonstrated below, the court's conclusion was groundless; it could not have been based on the evidence presented by the government at trial.

The government's witnesses consisted of several law enforcement officers and one medical expert, Dr. Paul Nauseida. Initially, the law enforcement officers had no

medical expertise and thus no ability to testify, nor did they testify, concerning "basic standards of the medical community." The court's determination that petitioner violated basic medical standards, therefore, would have to have been derived from Dr. Nauseida's testimony. His testimony, however, gave rise to no such conclusion.

Admittedly, petitioner did not perform physical examinations upon the law enforcement officers to whom he distributed phendimetrazine. This was consistent with petitioner's opinion based on a review of the literature and extensive clinical experience that phendimetrazine was "a very, very safe drug." (R. 439-440.) Dr. Nauseida, however, never testified that such conduct violated basic medical standards. Dr. Nauseida was questioned specifically concerning proper procedures for distributing phendimetrazine to an individual in good health who does not appear to be abusing the drug. Dr. Nauseida never said that dispensing phendimetrazine without extensive examination under these conditions would violate basic standards of the medical community. Rather, he merely said that dispensing the drug under these conditions would be "inappropriate." (R. 266-267.)

Moreover, in finding petitioner's conduct improper, the court, fashioning its own version of Dr. Nauseida's testimony, said that Dr. Nauseida "explained that before prescribing any drug a physician should obtain at least a brief medical history from the patient and conduct a basic physical examination." (Order at 3a.) Contrary to the court's implications, Dr. Nauseida's requirements for issuing a prescription for *any* drug did not end with a brief medical history and a brief physical examination. In fact, it was Dr. Nauseida's opinion that before prescribing any drug, an extensive battery of tests, including kidney and liver functions, was "abso-

lutely necessary." (R. 258-259.) Evidently, in failing to mention this important portion of Dr. Nauseida's testimony, the court recognized the total unrealism of Dr. Nauseida's opinion in that virtually no physician could satisfy these criteria for legitimate medical practice. Moreover, in ignoring crucial aspects of Dr. Nauseida's testimony, the court apparently recognized the wholesale lack of guidance this testimony presented to the jury concerning the propriety of petitioner's conduct.[3] The court, however, was not at liberty to consider the Government's evidence selectively.

This Court has made it clear that a reviewing court is prohibited from making its own subjective determination of a defendant's guilt or innocence. *See*: *Jackson v. Virginia*, 443 U.S. 307, 319, n. 13 (1979). In reviewing a conviction, the question is not upon what evidence the jury *could* have found the defendant guilty but upon what evidence the jury *did* find the defendant guilty. *Cf*: *Eaton v. City of Tulsa*, 415 U.S. 697, 698-699 (1974). In the present case, the Seventh Circuit ignored these mandates of this Court. In affirming petitioner's conviction based upon misstatements of the evidence adduced at trial, the court engaged in precisely the type of conduct this Court has forbidden—the subjective determination of a defendant's guilt or innocence. For this reason, also, the decision of the Seventh Circuit violated petitioner's right to due process.

Finally, granting the present petition or the alternative relief of remanding this cause to the Seventh Circuit with instructions to decide the issue previously

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[3] See Argument II, *infra*, wherein the failure to provide the jury with adequate standards by which to judge petitioner's conduct is discussed in detail.

raised on appeal is desirable in light of the widely reported concerns of many members of this Court regarding its ever-increasing workload. Exercise of this Court's supervisory powers will aid in eliminating subsequent decisions by United States courts of appeals, as occurred in the present case, which fail to address the issues presented for review or are based upon misstatements of he evidence adduced at trial. As a result, by exercising its supervisory powers this Court can stem the tide of additional requests for discretionary review on the grounds of the due process violation alleged above, which requests only will increase the heavy burden already shouldered by this Court.

II.

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED WAS UNCONSTITUTIONALLY VAGUE AS APPLIED TO HIM.

This Court has stated, "there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain." *Smith v. Goguen*, 415 U.S. 566, 577-578 (1974). That is precisely the situation in the case at bar. In those reported cases where physicians have been found guilty of violating 21 U.S.C. § 841(a)(1), the conduct has been so far removed from the course of legitimate medical practice that these physicians knew or should have known that their conduct was prohibited. However, as will be demonstrated below, the present case presents markedly different circumstances.

In *United States v. Rosen*, 582 F.2d at 1035-1036, the court gleaned from the reported cases nine factors indicating that a physician improperly prescribed a controlled substance. These factors are:

(1) An inordinately large quantity of controlled substances was prescribed;

(2) Large numbers of prescriptions were issued;

(3) No physical examination was given;

(4) The physician warned the patient to fill prescriptions at different drug stores;

(5) The physician issued prescriptions to a patient known to be delivering the drugs to others;

(6) The physician prescribed controlled drugs at intervals inconsistent with legitimate medical treatment;

(7) The physician involved used street slang rather than medical terminology for the drugs prescribed;

(8) There was no logical relationship between the drugs prescribed and treatment of the condition allegedly existing;

(9) The physician wrote more than one prescription in order to spread them out.

[citations omitted]

A number of these nine factors have been present in those cases where a physician has been convicted for violating Section 841(a)(1). *See, e.g.*: *United States v. Ellzey*, 527 F.2d 1306 (6th Cir. 1976) (physician, half of whose patients were "diet patients," issued 29,000 prescriptions of drug of patients' choice over twenty-two month period without performing physical exam and with knowledge that drug was not for legitimate medical purpose but would be resold on the street); *United States v. Hooker*, 541 F.2d 300 (1st Cir. 1976) (physician, who called drugs by street slang, issued prescriptions for drugs of patients' choice without physical exam and with knowledge that patients were without a legitimate medical need); *United States v. Rodgers*, 609 F.2d 834

(5th Cir. 1980) (physician frequently issued prescriptions for large quantities of drugs of patients' choice to many patients without a legitimate medical need and without performing physical examination).

While the *Rosen* court's list may not have been meant to be exhaustive, no indicia of improper conduct not noted in *Rosen* can be found in the present case. Moreover, of all the indicia of improper conduct that is noted in *Rosen*, the only factor present in the case at bar is petitioner's failure to perform physical examinations. The government presented no evidence of other conduct by petitioner which indicated that he distributed a controlled substance improperly.

Specifically, the government presented no evidence at trial that petitioner issued an inordinately large amount of phendimetrazine in total or to individual patients. Further, petitioner did not refer to phendimetrazine using street slang nor did he prescribe the drug at intervals inconsistent with legitimate medical practice.[4] In addition, petitioner prescribed phendimetrazine only; the evidence showed that he did not give patients their choice of drug. Petitioner testified that if a patient requested a stronger drug the request always was refused. (Tr. 444.) There also was evidence that petitioner cautioned patients regarding use of the drug, including warnings against overuse and use with other medication. (R. 59, 92-93, 105-107.) Petitioner also issued warnings that the drug should be kept out of children's reach. (R. 78, 92.) Finally, although on a few occasions

[4] Although petitioner gave one agent phendimetrazine on three occasions during the five and one-half week period from December 18, 1980 to January 27, 1981, that agent testified that he did not believe he was recognized as a former patient on his second visit to petitioner on January 6, 1981. (R. 103.)

petitioner gave the agents posing as patients a limited supply of phendimetrazine for their wives, (R. 58, 77, 138) this conduct was consistent with petitioner's professional judgment that no physical examination need precede the drug's use.

Further, the present case is wholly unlike those cases where a physician's conduct was deemed improper because he dispensed only prescriptions to be filled at a drug store and the fee depended upon the number of prescriptions written. *See, e.g.*: *United States v. Smurthwaite*, 590 F.2d 889, 892 (10th Cir. 1979); *United States v. Larson*, 507 F.2d 385, 387 (9th Cir. 1974). In the present case, petitioner gave his patients the drug, not just the prescription. It therefore was absolutely proper for petitioner's fee to depend upon the amount of phendimetrazine he gave the patient.

In addition, petitioner was charged with distributing only a Schedule III controlled substance. This Court should be aware that petitioner's research has not produced a single reported case where a physician was convicted of violating Section 841(a)(1) where only a Schedule III controlled substances was distributed. Rather, in every reported case, the convicted physician-defendant distributed a far more dangerous Schedule II controlled substance either alone or in combination with Schedule III and/or Schedule IV controlled substances.[5]

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[5] See: Appendix C where can be found a list of the cases to which petitioner refers. A controlled substance is a drug with potential for physical harm or abuse. (R. 251.) Such drugs are arranged by law in five Schedules according to the degree of their potential for harm or abuse. Schedule I is the most dangerous controlled substance and Schedule V is the least dangerous. (R. 252.) See: 21 CFR § 1308.11-1308.15. [Appendix B attached.]

Concerning the only indicia of improper conduct by petitioner, his failure to perform physical examinations, it should be noted that petitioner abandoned performing physical examinations because it was his professional judgment that phendimetrazine is "a very, very safe drug". (R. 439-440.) Petitioner's opinion was based upon extensive clinical experience with phendimetrazine and knowledge of the scientific literature.

Petitioner testified that he had practiced in the field of weight control for many years. By 1979, weight control programs comprised approximately twenty percent of his practice. (R. 437.) Petitioner always used medication in conjunction with his weight control program. Medication, however, was only one aspect of his treatment. He also instructed his patients regarding nutrition and gave them a meal plan to follow. (R. 441-442.) In 1973, the amphetamines that petitioner was prescribing for weight control became a Schedule II drug which required extensive record keeping. As a result, he began prescribing phendimetrazine, a Schedule III drug, not requiring that records of its distribution be kept. (R. 438, 445-446.)

Petitioner explained that when he first began using phendimetrazine, because he was unfamiliar with its effects, he would examine patients before prescribing it. (R. 438-439.) After prescribing phendimetrazine to several hundred patients after performing physical examinations, however, petitioner found that the drug had no ill effects, including effect upon blood pressure, sleeplessness or nervousness. (R. 439, 444.)

Petitioner also familiarized himself with the medical research literature regarding phendimetrazine and weight control. (R. 440.) Based on his extensive clinical experience with phendimetrazine and his review of this

literature, it was petitioner's professional judgment that phendimetrazine is a very safe drug. (R. 439-440.) Petitioner, therefore, no longer believed it necessary to perform a physical examination before he prescribed the drug. (R. 439-440.)

Petitioner's clinical decision to forego performing medical tests before prescribing phendimetrazine was supported by the testimony of Dr. James E. Gearien. Dr. Gearien, a Professor of Medicinal Chemistry and Chairman of the Medicinal Chemistry Department at the University of Illinois Medical Center, Chicago, testified as a defense expert on phendimetrazine and its properties and its effects on human beings. (R. 326, 329.) Since 1948, Dr. Gearien has done research and taught organic chemistry, medicinal chemistry and drug analysis. (R. 327.) He has published thirty to forty scientific papers including one, published in 1981, dealing with phendimetrazine. (R. 328.) Dr. Gearien also has authored several educational publications, co-authored a book on drug analysis and contributed chapters to two books on medicinal chemistry. (R. 328-329.)

Dr. Gearien testified that he was familiar with all of the research literature dealing with phendimetrazine and its clinical use published from 1950 to the present. (R. 330.) He reported that practically no effect on the biological system of a person taking two to three tablets of phendimetrazine daily ever was noted in the literature. (R. 332.) Dr. Gearien said studies reported that the drug had no effect on blood pressure, no effect on the sugar content of a diabetic's blood and practically no noticeable effect on the user's central nervous system. (R. 332-333.) He explained that while phendimetrazine might cause slight mood elevation, a similar stimulation could be had from a cup of coffee. (R. 333.) Further, Dr.

Gearien found no clinical study that produced counter-data indicating a toxic reaction of any kind from phendimetrazine. (R. 333-334.)

In addition, Dr. Gearien noted a study by Dr. Carl D. Chambers entitled "The Epidemiology of Stimulant Abuse: A Focus on the Amphetamine Related Substances". This study found that less than one percent of persons with a history of drug abuse preferred phendimetrazine as the drug for abuse. This study, therefore, indicated that phendimetrazine has a low potential for abuse. (R. 334-335, 341.)

Thus it seems clear that petitioner, a seventy-seven year old retired physician, had no reason to engage in the illegal distribution of phendimetrazine. Petitioner, therefore, must not have been aware that his conduct could be considered improper. As discussed above, the only factor by which petitioner's actions could be said to violate Section 841(a)(1) was his failure to perform physical examinations. The evidence, however, established that this conduct was consistent with his opinion of phendimetrazine developed through extensive clinical experience and knowledge of the literature.

Unlike those defendants in the reported cases who were convicted of violating Section 841(a)(1), petitioner was not a "pill-pusher" with a medical degree. In fact, at his sentencing hearing the government acknowledged that petitioner, at the close of his long and prosperous medical career, had no financial motive to perform the acts for which he was convicted. (Sentencing Hearing Tr. at 15.) Thus, for petitioner to have been found guilty of violating Section 841(a)(1), the conclusion is inescapable that this statute, while valid on its face and as applied to hard core violators, was unconstitutionally vague as applied to the present case.

This Court has said,

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giaccio v. State of Pennsylvania, 382 U.S. 400, 402-403 (1966) (citations omitted). Beyond failing to apprise this petitioner that his conduct was proscribed, Section 841(a) was "void for vagueness as applied to [the present case] because it subjected [petitioner] to criminal liability under a standard so indefinite that police, court and jury were free to react to nothing more than their own preferences" concerning the distribution of phendimetrazine. *See*: *Smith v. Goguen*, 415 U.S. at 578. "This deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact." *Cf.*: *Id.*

As this Court is aware, Section 841(a)(1) and the regulations promulgated pursuant thereto provide little guidance concerning the type of conduct the statute proscribes. *See*: *United States v. Green*, 511 F.2d 1062, 1069-1070 (7th Cir. 1975). Moreover, because any prosecution under this section requires the second guessing of professional medical judgments, such prosecution necessarily involves prosecutorial discretion. Therefore, this lack of statutory guidance and necessity of prosecutorial discretion may make it difficult for a physician, once indicted, to defend his conduct.

Of course, in certain cases, such as those discussed above (pp. 12-13, *supra*), the physician's conduct may have been so blatantly improper that a trier of fact could easily determine that Section 841(a)(1) was vio-

lated. This, however, was not the situation in the present case where, as discussed above, petitioner's sole failing was not performing physical examinations. Thus the decision to charge this petitioner required the exercise of much greater prosecutorial discretion than typically might be present.

In addition, because this was a close case, a finding of impropriety was more difficult to reach than in cases where the conduct was blatantly improper. Thus, for a valid jury verdict to have been rendered in this case, the jury must have been informed clearly as to what conduct of a licensed physician constitutes the distribution of a controlled substance outside the scope of legitimate medical practice. Because in the present case the jury never was given adequate standards by which to judge petitioner's conduct, his conviction should not be allowed to stand.

Initially, as previously discussed, the government's evidence consisted of the testimony of several law enforcement officers to whom petitioner had distributed phendimetrazine and one medical expert, Dr. Paul Nauseida. Because the law enforcement officers had no medical expertise, only Dr. Nauseida had the ability to inform the jury as to what conduct of a petitioner would constitute the distribution of phendimetrazine outside the scope of legitimate medical practice. Dr. Nauseida, however, never so informed the jury. As will be demonstrated below, Dr. Nauseida provided no viable guide by which the jury could assess the propriety of petitioner's conduct.

In testifying, Dr. Nauseida admitted that phendimetrazine is an accepted form of therapy for treatment of obesity. (R. 255.) Dr. Nauseida's testimony revealed that he had no clinical experience, let alone expertise, in the

field of obesity treatment. Dr. Nauseida explained that he is a medical researcher investigating movement disorders and sleep disorders. (R. 247.) He is a clinician only to the extent that most of his research has been done on patients. (R. 247.)

In addition, although Dr. Nauseida claimed expertise in the area of central stimulant drugs, he testified that he never has prescribed phendimetrazine for a patient. (R. 274-275, 280.) Rather, Dr. Nauseida's knowledge of phendimetrazine was derived from the research literature concerning phendimetrazine's basic chemistry and its effects in animal systems and the drug's similarity to other central stimulants. (R. 274.) The only clinical experience that Dr. Nauseida ever had with phendimetrazine involved research using guinea pigs. (R. 275.)

Despite Dr. Nauseida's lack of experience with phendimetrazine, it was his theoretical opinion that before prescribing that drug a physician should be sure that the patient's liver and kidneys are normal, take a medical history, including history of hyperthyroidism, diabetes, psychiatric disease, and drug abuse, perform a physical examination and rely on certain unspecified biochemical tests. (R. 258-262.)

Dr. Nauseida further testified that in his own practice, apparently referring to his clinical research involving patients with sleep or movement disorders, he required certain tests when using these "compounds." (R. 262.) Of course, Dr. Nauseida was not referring to phendimetrazine, a drug which he did not use. Dr. Nauseida said before prescribing a central stimulant for his research subjects he likes to take a medical history, perform a physical examination, a limited biochemical screen, a kidney function, a liver function and be satisfied that there is no evidence of hyperthyroidism in the patient. (R. 262-264.)

In light of the research nature of Dr. Nauseida's work and the probable severity of his patients' diseases (to make them interesting subjects of research), it is understandable that Dr. Nauseida would like an extensive battery of tests performed before prescribing a central stimulant drug to his patients. Dr. Nauseida, however, never testified that all of the tests he required for his work would be required for a physician treating obesity not to be considered prescribing phendimetrazine "outside the practice" of medicine. At most, it was Dr. Nauseida's opinion that for a physician to prescribe phendimetrazine in the absence of these tests to an individual in good health who does not appear to be abusing the drug would be "inappropriate." (R. 266-267.)

That Dr. Nauseida's opinion was unrealistic regarding the number of tests he believed should be performed before a physician properly prescribes phendimetrazine was evidenced by his opinion of what tests are "absolutely necessary" before *any* drug is prescribed to a patient. Dr. Nauseida testified that before any drug is prescribed, a physician must take medical history, have knowledge that the patient's organs were functioning normally (presumably derived from clinical tests) and be aware of the patient's prior reactions to other drugs. (R. 258-259.) That all of these tests are required before a physician legitimately can prescribe a drug runs counter to basic human experience. For example, surely this Court is aware that physicians routinely prescribe medication over the telephone without performing any examinations or tests whatsoever. Clearly, Dr. Nauseida espoused the ideal. The ideal, however, would make the cost of prescribing drugs prohibitive for patients, particularly non-affluent patients visiting a neighborhood doctor like defendant. According to Nauseida, any physician who prescribes *any* drug in the absence of exten-

sive medical testing acts "outside the practice" of medicine. Dr. Nauseida's feelings simply could not be considered a viable guide.

Likewise, the court's instructions failed to inform the jury concerning what conduct by defendant the government would have to establish to meet its burden of proving the third element of a Section 841(a)(1) violation. Rather, the jury merely was instructed that the government had to prove:

> [T]hat the distribution by the defendant of phendimetrazine was not in the usual course of professional practice and not for a legitimate medical or research reason.

(R. 522-524.) This nebulous standard provided the jury with no guidance in its determination of defendant's guilt or innocence.

Thus when the jury found that petitioner violated Section 841(a)(1) it did so in the absence of any standards by which to judge petitioner's conduct. For this reason, also, petitioner's right to due process was violated.

CONCLUSION

For the reasons set forth above, FRANK R. SWIATEK urges that his petition for a writ of certiorari be granted, or, in the alternative, that this Court exercise its supervisory powers and remand this cause to the United States Court of Appeals for the Seventh Circuit with instructions that the court address and decide the issue previously raised by petitioner on appeal.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED OCTOBER 28, 1982)

December 6, 1982

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN MINOR WISDOM, *Senior Judge**
Hon. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 82-1571 *vs.*

FRANK R. SWIATEK,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 CR 571—**Milton I. Shadur**, *Judge.*

ORDER

Defendant Frank R. Swiatek, a retired physician, was convicted by a jury on seven counts of illegal distribution

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* The Honorable John Minor Wisdom, Senior Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

of a controlled substance in violation of 21 U.S.C. § 841(a)(1) (1980). The defendant was fined a total of $60,000, and sentenced to a short term of imprisonment followed by an eight-year special parole term. He appeals his conviction on the grounds that the government failed to prove that the drug distribution was outside the usual course of professional practice and not for a legitimate medical or research purpose, and that the jury was not properly instructed as to what constitutes distribution "outside the practice" of medicine. We affirm.

I

Defendant Swiatek was convicted of distributing phendimetrazine, a Schedule III controlled substance, outside the practice of medicine. Swiatek sold the phendimetrazine from his office in boxes containing approximately sixty tablets, a month's supply. Swiatek testified that he prescribed the tablets as an aid to weight control. During December 1980, and January, July, and September of 1981, Swiatek sold the phendimetrazine to law enforcement agents from Illinois and the Drug Enforcement Administration who posed as patients.

Trial testimony revealed that Swiatek sold phendimetrazine to the law enforcement agents without first conducting a physical examination. Swiatek testified that he administered blood pressure tests to first-time weight control patients, but not to patients who returned for prescription refills. According to his testimony, when Swiatek first began administering phendimetrazine, he would closely monitor his patients' reactions to the drug. He abandoned that practice, however, when he became satisfied that the drug was completely safe. Swiatek did not record the quantity or frequency of his drug sales.

II

The defendant argues that the government's evidence is insufficient to support a conviction. This court will not disturb the jury's verdict if it is supported by substantial evidence viewed most favorably to the government.

Glasser v. United States, 315 U.S. 60, 80 (1942); *United States v. Santiago*, 582 F.2d 1128, 1130 (7th Cir. 1978). All of the law enforcement agents who testified for the government agreed that the defendant made no medical inquiries before giving them phendimetrazine. Nor did he check their weights or ask about their progress. Additionally, the agents testified that they made statements during their visits to the defendant implying that they did not use the drug as a weight-control device. The agents testified that, despite these statements, the defendant sold to them as many as six boxes of the tablets (approximately 360 pills) in a single visit.

A medical expert testifying for the government described phendimetrazine as a central stimulant. He explained that before prescribing any drug a physician should obtain at least a brief medical history from the patient and conduct a basic physical examination. Additionally, the expert testified that a physician had to be alert to coronary problems and possible drug abuse problems.

The evidence *in toto*, when construed most favorably to the government, is "substantial." The government's witnesses revealed that the defendant's system of dispensing phendimetrazine violated basic standards of the medical community and seemed unrelated to medical need. From this evidence, the jury could properly find against the defendant. Therefore, we hold that the government sustained its burden of proof at trial of the element "outside the practice" of medicine.

The defendant also contends that the jury was not properly instructed. He argues that the instruction given was insufficient because it used the phrase "not in the usual course of professional practice," but did not specifically describe the conduct necessary to establish this element of the offense. The defendant, however, has extracted out of context only a portion of one instruction. We believe that all of the instructions considered together properly informed the jury of the law.

The judge instructed the jury that the government had to prove:

> First, that the defendant distributed phendimetrazine, a Schedule III controlled substance, on the dates charged in the indictment. Second, that the defendant did that knowingly and intentionally. And, third, that the distribution by the defendant of phendimetrazine was not in the usual course of professional practice and not for a legitimate medical or research purpose.

Tr. at 522-23. In addition, the judge instructed the jury:

> A controlled substance is prescribed by a physician in the course of his professional practice and, therefore, lawfully if the substance is prescribed by him in good faith in medically treating his patients. In order to determine whether or not a prescription or prescriptions were in the course of a defendant's professional practice, you may consider all of the evidence of circumstances that surrounded the prescribing of the substance, the statements of the parties to the transaction in which the prescription was made, any expert testimony as to what the usual course of medical practice is, and any other competent evidence that bears on the purpose for which the substances in question were prescribed.

Tr. at 524. These instructions have been approved before, *e.g.*, *United States v. Boettjer*, 569 F.2d 1078, 1080-82 (9th Cir.), *cert. denied*, 435 U.S. 976 (1978), and we agree that they clearly and sufficiently state the law. *See United States v. Green*, 511 F.2d 1062, 1071 & n.22 (7th Cir.), *cert. denied*, 423 U.S. 1031 (1975).

III

For the reasons stated, the defendant has not shown any error in the proceedings below. Accordingly, the district court's judgment is affirmed.

AFFIRMED.

APPENDIX B

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

General Information

Sec.

1308.01 Scope of Part 1308.
1308.02 Definitions.
1308.03 Administration Controlled Substances Code Number.
1308.04 Submisstion of information by manufacturers.

Schedules

1308.11 Schedule I.
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1308.13 Schedule III.
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Excluded Nonnarcotic Substances

1308.21 Application for exclusion of a nonnarcotic substance.
1308.22 Excluded substances.

Exempt Chemical Preparations

1308.23 Exemption of certain chemical preparations; application.
1308.24 Exemption chemical preparations.

Excepted Stimulant or Depressant Compounds

1308.31 Application for exception of a stimulant or depressant compound.
1308.32 Excepted compounds.

HEARINGS

1308.41 Hearings generally.
1308.42 Purpose of hearing.
1308.43 Waiver or modification of Rules.
1308.44 Initiation of proceedings for rule-making.
1308.45 Request for hearing or appearance; waiver.
1308.46 Burden of proof.
1308.47 Time and place of hearing.
1308.48 Final order.
1308.49 Control required under international treaty.
1308.50 Control of immediate precursors.
1308.51 Pending proceedings.

AUTHORITY: Secs. 201, 202, 501(b), 84 Stat. 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1271, 21 U.S.C. 811, 812, 871(b).

SOURCE: 38 FR 8254, Mar. 30, 1973. Redesignated at 38 FR 26609, Sept. 24, 1973, unless otherwise noted.

NOMENCLATURE CHANGES: 38 FR 26609, Sept. 24, 1973.

GENERAL INFORMATION

§ 1308.01 Scope of Part 1308.

Schedules of controlled substances established by section 202 of the Act (21 U.S.C. 812), as they are changed, updated, and republished from time to time, are set forth in this part.

§ 1308.02 Definitions.

As used in this part, the following terms shall have the meanings specified:

(a) The term "Act" means the Controlled Substance Act (84 Stat. 1242; 21 U.S.C. 801) and/or the Controlled Substances Import and Export Act (84 Stat. 1285; 21 U.S.C. 951).

(b) The term "hearing" means any hearing held pursuant to this part for the issuance, amendment, or repeal of any rule issuable pursuant to section 201 of the Act.

(c) The term "isomer" means, except as used in § 1308.11(d), the optical isomer. As issued in § 1308.11(d), the term "isomer" means the optical, position or geometric isomer.

(d) The term "interested person" means any person adversely affected or aggrieved by any rule or proposed rule issuable pursuant to section 201 of the Act.

(e) The term "proceeding" means all actions taken for the issuance, amendment, or repeal of any rule issued pursuant to section 201 of the Act, commencing with the publication by the Administrator of the proposed rule, amended rule, or repeal in the FEDERAL REGISTER.

(f) Any term not defined in this section shall have the definition set forth in section 102 and 1001 of the Act (21 U.S.C. 802 and 951) and § 1301.02 of this chapter.

§ 1308.03 Administration Controlled Substances Code Number.

(a) Each controlled substance, or basic class thereof, has been assigned a "Administration Controlled Substances Code Number" for purposes of identification of the substances or class on certain Certificates of Registration issued by the Administration pursuant to § 1301.44 of this chapter and on certain order forms issued by the Administration pursuant to § 1305.05(d) of this chapter. Certain applicants for registration must include the appropriate numbers on the application as required in § 1301.32(d) and applicants for procurement and/or individual manufacturing quotas must include the appropriate number on the application as required in §§ 1303.12(b) and 1303.22(a).

(b) Except as stated in paragraph (a) of this section, no applicant or registrant is required to use the Administration Controlled Substances Code Number for any purpose.

§ 1308.04 Submission of information by manufacturers.

(a) Each person who manufactures, packages, repackages, labels, relabels, or distributes under his own label any product (including any compound, mixture, or preparation, diagnostic, reagent, buffer, or biological) containing any quantity of any controlled substance (whether such product is itself controlled or is excepted, exempted, or excluded from some or all controls pursuant to § 1308.21-24 or § 1308.31-32) shall submit information required in paragraph (b) of this section for each such product being manufactured or sold on July 1, 1972. The information should be submitted by registered mail, return receipt requested, to the Assistant Director for Scientific Support. Attention: Label Project, Drug Enforcement Administration, Department of Justice, Washington, D.C. 28083, by August 31, 1972. In the case of new products manufactured after July 1, 1972, or new dosage forms or other unit forms manufactured after July 1, 1972, or changes in information submitted by August 31, 1972, the registrant shall submit the information regarding such item within 30 days after the date on which the manufacture commences or information change occurs. In the case of products, the manufacture of which is discontinued after July 1, 1972, the registrant shall submit notice of such discontinuance within 30 days after the date on which manufacture ceases. In the case of products the manufacture of which was discontinued before July 1, 1972, which are still being sold, the registrant shall submit a notice of such discontinuance with his initial submission.

(b) Two labels or other documents reflecting the following information shall be submitted with reference to each dosage form or other unit form of each item containing any quantity of any controlled substance:

(1) The trade name, brand name, or other commercial name of the product;

(2) The generic or chemical name and quantity of each active ingredient, including both controlled and noncontrolled substances (if any of this information is a proprietary trade secret, please indicate those portions);

(3) The National Drug Code Number assigned to the product, if any; and

(4) The weight (in metric measure) of each dosage unit or the weight (in metric measure) of the controlled substance per 100 grams of finished product for all items containing any quantity of any narcotic controlled substance in solid dosage forms.

SCHEDULES

§ 1308.11 Schedule I.

(a) Schedule I shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Opiates.* Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, salts is possible within the specific chemical designation:

(1)	Acetylmethadol	9601
(2)	Allylprodine	9602
(3)	Alphacetylmethadol	9603
(4)	Alphameprodine	9604
(5)	Alphamethadol	9605
(6)	Benzethidine	9606
(7)	Betacatylmethadol	9607
(8)	Betameprodine	9608
(9)	Betamethadol	9609
(10)	Betaprodine	9611
(11)	Conitazene	9612
(12)	Dextromoramide	9613
(13)	Diampromide	9615
(14)	Diethylthiambutene	9616
(15)	Dilenoxin	9618
(16)	Dimenoxadol	9617

(17)	Dimepheptanol	9618
(18)	Dimethylthiambutene	9619
(19)	Dioxaphetyl butyrate	9621
(20)	Dipipanone	9622
(21)	Ethylmethylthiambutene	9623
(22)	Etonitazene	9624
(23)	Etoxeridine	9625
(24)	Furethidine	9626
(25)	Hydroxypethidine	9627
(26)	Ketobemidone	9628
(27)	Levomoramide	9629
(28)	Levophenacylmorphan	9631
(29)	Morpheridine	9632
(30)	Noracymethadol	9633
(31)	Norlevorphanol	9634
(32)	Normethadone	9635
(33)	Norpipanone	9636
(34)	Phenadoxone	9637
(35)	Phenampromide	9638
(36)	Phenamorphan	9647
(37)	Phenoperidine	9641
(38)	Piritramide	9642
(39)	Proheptazine	9643
(40)	Properidine	9644
(41)	Propiram	9649
(42)	Racemoramide	9645
(43)	Sufentanil	9740
(44)	Tilidine	9750
(45)	Trimeperidine	9646

(c) *Opium derivatives.* Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1)	Acetorphine	9319
(2)	Acetyldihydrocodeine	9051
(3)	Benzylmorphine	9052
(4)	Codeine Methylbromide	9070

(5) Codeine-N-Oxide 9053
(6) Cyprenorphine 9054
(7) Desomorphine 9055
(8) Dihydromorphine 9145
(9) Drotebanol 9335
(10) Etorphine (except hydrochloride salt) 9056
(11) Heroin 9200
(12) Hydromorphinol 9301
(13) Methyldesorphine 9302
(14) Methyldihydromorphine 9304
(15) Morphine methylbromide 9305
(16) Morphine methylsulfonate 9306
(17) Morphine-N-Oxide 9307
(18) Myrophine 9308
(19) Nicocodeine 9309
(20) Nicomorphine 9312
(21) Normorphine 9313
(22) Pholcodine 9314
(23) Thebacon 9315

(d) *Hallucinogenic substances.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position and geometric isomers):

(1) 4-bromo-2,5-dimethoxy-amphetamine 7391
Some trade or other names: 4 - bromo - 2,5 - dimethoxy - a methylphenethylamine; 4 - bromo - 2,5 -DMA
(2) 2,5 - dimethoxyamphetamine 7396
Some trade or other names: 2,5 - dimethoxy - a - methylphenethylamine; 2,5 - DMA
(3) 4 - methoxyamphetamine 7411
Some trade or other names: 4 - methoxy - a methylphenethylamine; paramethoxyamphetamine, PMA

(4) 5-methoxy-3,4-methylenedioxy-amphetamine .. 7401
(5) 4 - methyl - 2,5 - dimethoxy - amphetamine .. 7395
Some trade and other names: 4 - methyl - 2,5 - dimethoxy - a - methylphenethylamine; "DOM"; and "STP"
(6) 3,4 - methylenedioxy amphetamine 7400
(7) 3,4,5 - trimethoxy amphetamine 7390
(8) Bufotenine 7433
Some trade and other names: 3 - (B - Dimethylaminoethyl) - 5 - hydroxyindole; 3 - (2 - dimethylaminoethyl) - 5 - indolol; N, N - dimethylserotonin; 5 - hydroxy - N,N - dimethyltryptamine; mappine
(9) Diethyltryptamine 7434
Some trade and other names: N,N - Diethyltryptamine; DET
(10) Dimethyltryptamine 7435
Some trade or other names: DMT
(11) Ibogaine 7260
Some trade and other names: 7 - Ethyl - 6,6B,7,-8,9,10,12,13 - octahydra - 2 - methoxy - 6,9 - methano - 5H - pyrido [1′. 2′:1.2] azepino [5.4 - b] indole; Tabernanthe iboga
(12) Lysergic acid diethylamide 7315
(13) Marihuana 7360
(14) Mescaline 7381
(15) Peyote 7415
Meaning all parts of the plant classified botanically as *Lophophora Williamsii Lemaire*, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts
(Interprets 21 USC 812(c), Schedule I(c)(12))
(16) N-ethyl-3-pipendyl benzilate 7482
(17) N-methyl-3-piperidyl benzilate 7484
(18) Psilocybin 7437
(19) Psilocyn 7438
(20) Tetrahydrocannabinols 7370

Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of *Cannabis*, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

s1 cis or trans tetrahydrocannabinol, and their optical isomers

s6 cis or trans tetrahydrocannabinol, and their optical isomers

s3,4 cis or trans tetrahydrocannabinol, and its optical isomers

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

(21) Ethylamine analog of phencyclidine 7455
Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1 - phenylcyclohexyl)ethylamine, N-(1 - phenylcyclohexy)ethylamine, cyclohexamine, PCE

(22) Pyrrolidine analog of phencyclidine 7458
Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP

(23) Thiophene analog of phencyclidine 7470
Some trade or other names: 1 - [1 - (2 - thienyl) - cyclohexyl] - piperidine, 2 - thienylanalog of phencyclidine, TPCP, TCP

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) mecloqualone 2572

[39 FR 22141, June 20, 1974, as amended at 40 FR 19813, May 7, 1975]

NOTE: For FR citations affecting § 1308.11, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 1308.12 Schedule II.

(a) Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the Controlled Substances Code Number set forth opposite it.

(b) Substances, vegetable origin or chemical synthesis. Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation or opium or opiate, excluding apormorphine, dextrorphan, nalbuphine, naloxone, and naltrexone, and their respective salts, but including the following:

1	Raw opium	9600
2	Opium extracts	9610
3	Opium fluid extracts	9620
4	Powdered opium	9639
5	Granulated opium	9640
6	Tincture of opium	9630
7	Codeine	9050
8	Ethylmorphine	9190
9	Etorphine hydrochloride	9059
10	Hydrocodone	9193
11	Hydromorphone	9150
12	Metapon	9260
13	Morphine	9300
14	Oxycodone	9143
15	Oxymorphone	9652
16	Thebaine	9333

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (b)(1) of this section, except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves (9040) and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine (9041) or ecgonine (9180).

(5) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrene alkaloids of the opium poppy); 9670.

(c) *Opiates.* Unless specifically excepted or unless in another schedule any of the following opiates, including its isomers, esters, ethers, salts and salts of isomers, esters and ethers whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation, dextrorphan and levopropoxyphene excepted:

(1)	Alphaprodine	9010
(2)	Anileridine	9020
(3)	Bezitramide	9800
(4)	Bulk dextropropoxyphene (non-dosage forms)	9273
(5)	Dihydrocodeine	9120
(6)	Diphenoxylate	9170
(7)	Fentanyl	9801
(8)	Isomethadone	9226
(9)	Levomethorphan	9210
(10)	Levorphanol	9220
(11)	Metazocine	9240
(12)	Methadone	9250
(13)	Methadone-intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane	9254

(14) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carbonyl acid 9802
(15) Pethidine (meperidine) 9230
(16) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpipendine 9232
(17) Pethidine-Intermediate-B, ethyl-4-phenyl-piperidine-4-carboxylate 9233
(18) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid 9234
(19) Phanazocine 9715
(20) Piminodine 9730
(21) Racemethorphan 9732
(22) Racemorphan 9733

(d) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers 1100
(2) Methamphetamine, its salts, isomers, and salts of its isomers 1105
(3) Phenmetrazine and its salts 1631
(4) Methylphenidate 1724

(e) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital 2125
(2) Methaqualone 2565
(3) Pentobarbital 2270
(4) Phencyclidine 7471
(5) Secobarbital 2315

(f) *Immediate precursors.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:

(i) Phenylacetone—8501
Some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.

(2) Immediate precursors to phencyclidine (PCP):

(i) 1-phenylcyclohexylamine—7460
(ii) 1-piperidinocyclohexanecarbonitrile (PCC)—8603

[39 FR 22142, June 20, 1974, as amended at 40 FR 6780, Feb. 14, 1975]

NOTE: For FR citations affecting § 1308.12, see the List of CFR Sections Affected in the Findings Aids section of this volume.

§ 1308.13 Schedule III.

(a) Schedule III shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Those compounds, mixtures, or preparations in dosage unit form containing any stimulant substances listed in schedule II which compounds, mixtures, or preparations were listed on August 25, 1971, as excepted compounds under § 308.32, and any other drug of the quantitive composition shown in that list for those drugs or which is the same except that it contains a lesser quantity of controlled substances 1405

(2) Benzphetamine 1228
(3) Chlorphentermine 1645
(4) Clortermine 1647
(5) Mazindol 1605
(6) Phendimetrazine 1615

(c) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any compound, mixture or preparation containing:
(i) Amobarbital 2125
(ii) Secobarbital 2315
(iii) Pentobarbital 2270
or any salt thereof and one or more other active medicinal ingredients which are not listed in any schedule.
(2) Any suppository dosage form containing:
(i) Amobarbital 2125
(ii) Secobarbital 2315
(iii) Pentobarbital 2270
or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository.
(3) Any substance which contains any quantity of a derivative of barbituric acid or any salt thereof . 2100
(4) Chlorhexadol 2510
(5) Glutethimide 2550
(6) Lysergic acid 7300
(7) Lysergic acid amide 7310
(8) Methyprylon 2575
(9) Sulfondiethylmethane 2600
(10) Sulfonethylmethane 2605
(11) Sulfonmethane 2610

(d) Nalorphine 9400.

(e) *Narcotic Drugs.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium 9803

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts 9804

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium 9805

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts 9806

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts 9807

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts 9808

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts 9809

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts 9810

[39 FR 22142, June 20, 1974, as amended at 41 FR 43401, Oct. 1, 1976; 43 FR 3359, Jan. 25, 1978; 44 FR 40888, July 13, 1979]

§ 1308.14 Schedule IV.

(a) Schedule IV shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

(b) *Narcotic drugs.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(1) Not more than 1 milligram of difenoxin (DEA Drug Code No. 9168) and not less than 25 micrograms of atropine sulfate per dosage unit.

(2) Dextropropoxyphene (alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane) 9273

(c) *Depressants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Barbital 2145
(2) Chloral betaine 2460
(3) Chloral hydrate 2465
(4) Chlordiazepoxide 2744
(5) Conazepam 2737
(6) Corazepate 2768
(7) Diazepam 2765
(8) Ethchlorvynol 2540
(9) Ethinamate 2545
(10) Flurazepam 2767
(11) Lorazepam 2885
(12) Mebutamate 2800
(13) Meprobamate 2820
(14) Methohexital 2264

(15) Methylphenobarbital (mephobarbital) 2250
(16) Oxazepam 2835
(17) Paraldehyde 2585
(18) Petrichoral 2591
(19) Phenobarbital 2285
(20) Prazepam 2764

(d) *Fenfluramine.* Any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:

(1) Fenfluramine 1670

(e) *Stimulants.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Diethylpropion 1610
(2) Phentarmine 1640
(3) Pamoline (including organometallic complexes and chelates thereof) 1530
(4) Pipradrol 1750
(5) SPA ((-)-1-dimethylamino-1,2-diphenylethane) . 1635

(f) *Other substances.* Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts:

(1) Pentazocine 9709

[39 FR 22143, June 20, 1974; 40 FR 4150, Jan. 28, 1975, as amended at 40 FR 24001, June 4, 1975]

NOTE: For FR citations affecting § 1308.14, see the List of CFR Sections Affected in the Findings Aids section of this volume.

§ 1308.15 Schedule V.

(a) Schedule V shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

(b) Narcotic drugs containing nonnarcotic active medicinal ingredients. Any compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below, which shall include one or more non-narcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by narcotic drugs alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

(6) Not more than 0.5 milligram of difenoxin (DEA Drug Code No. 9168) and not less than 25 micrograms of atropine sulfate per dosage unit.

(c) Loperamide 8125.

[39 FR 22143, June 20, 1974, as amended at 42 FR 25499, May 18, 1977; 43 FR 38383, Aug. 28, 1978; 44 FR 40888, July 13, 1979]

APPENDIX C

CASES PRODUCED BY DEFENDANT'S RESEARCH WHEREIN PHYSICIANS WERE CONVICTED OF VIOLATING SECTION 841(a)(1), NOTING THE CONTROLLED SUBSTANCES WHICH THEY DISTRIBUTED

1. *United States v. Moore*, 423 U.S. 122 (1975) — Schedule II
2. *United States v. Roya*, 574 F.2d 386 (7th Cir. 1978) — Schedule II
3. *United States v. Green*, 511 F.2d 1062 (7th Cir. 1975) — Schedule II and Schedule III
4. *United States v. Voorhies*, 663 F.2d 30 (6th Cir. 1981) — Schedule II
5. *United States v. Harrison*, 651 F.2d 353 (5th Cir. 1981) — Four controlled substances — not specified which Schedule
6. *United States v. Thompson*, 624 F.2d 740 (5th Cir. 1980) — Schedule II
7. *United States v. Rodgers*, 609 F.2d 834 (5th Cir. 1980) — Schedule II (8 counts) and Schedule IV (3 counts)
8. *United States v. Dunbar*, 614 F.2d 39 (5th Cir. 1980) — Schedule II
9. *United States v. Potter*, 616 F.2d 384 (9th Cir. 1979) — Schedule II
10. *United States v. Smurthwaite*, 590 F.2d 889 (10th Cir. 1979) — Schedule II
11. *United States v. Rosen*, 582 F.2d 1032 (5th Cir. 1978) — Schedule II, Schedule III and Schedule IV
12. *United States v. Kirk*, 584 F.2d 773 (6th Cir. 1978) — Schedule II

13. *United States v. Boettjer*, 569 F.2d 1078 (9th Cir. 1978) *cert. denied* 98 S. Ct. 1627 — Schedule II
14. *United States v. Greenfield*, 554 F.2d 179 (5th Cir. 1977) — Schedule II
15. *United States v. Davis*, 564 F.2d 840 (9th Cir. 1977) *cert. denied* 98 S. Ct. 733 — Schedule II
16. *United States v. Fellman*, 549 F.2d 181 (10th Cir. 1977) — Schedule II
17. *United States v. Hooker*, 541 F.2d 300 (1st Cir. 1976) — Schedule II
18. *United States v. Ellzey*, 527 F.2d 1306 (6th Cir. 1976) — Schedule II
19. *United States v. Rosenberg*, 515 F.2d 190 (9th Cir. 1975) — Schedule II and Schedule IV
20. *United States v. Lawson*, 570 F.2d 385 (9th Cir. 1974) — Schedule II and Schedule III
21. *United States v. Leigh*, 487 F.2d 206 (5th Cir. 1973) — Schedule II
22. *United States v. Badia*, 490 F.2d 296 (1st Cir. 1973) — Schedule II
23. *United States v. Collier*, 478 F.2d 268 (5th Cir. 1973) — Schedule II
24. *United States v. Bartee*, 479 F.2d 454 (10th Cir. 1973) — Schedule II

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 18, 1983

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN MINOR WISDOM, *Senior Judge**
Hon. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 82-1571 *vs.*

FRANK R. SWIATEK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 571—Milton I. Shadur, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant Frank R. Swiatek, all of the judges on the original panel having voted to deny the same,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable John Minor Wisdom, Senior Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America,

No. 81 CR 571-I vs.

FRANK R. SWIATEK, Defendant.

JUDGMENT AND
PROBATION/COMMITMENT ORDER

* * * * *

FINDING & JUDGMENT—

Defendant has been convicted as charged of the offense(s) of knowingly, wilfully and unlawfully distributing Phendimetrazine, a Schedule III Controlled Substance, not in the course of defendant's professional practice, in violation of title 21, U.S. Code section 841(a)(1) as charged in counts 1, 2, 3, 4, 5, 6 and 7 of the indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of NINETY (90) DAYS, with a Special Parole term of EIGHT (8) YEARS to follow, and is fined the sum of Fifteen Thousand ($15,000.00) Dollars, on count 1.

SENTENCE OR PROBATION ORDER—

IT IS FURTHER ADJUDGED that on counts 2, 3 and 4 of the indictment defendant is remanded to the custody of the Attorney General for a period of NINETY (90) DAYS,

with a Special Parole term of EIGHT (8) YEARS to follow, and is fined the sum of $15,000.00.

IT IS FURTHER ADJUDGED that the period of custody and the Special Parole terms imposed on counts 2, 3 and 4 are to run concurrently as to each of counts 2, 3 and 4, and also concurrently with the period of custody and the Special Parole term imposed on count 1. Defendant's $15,000.00 fines apply as to each of counts 1, 2, 3 and 4, for a total fine of SIXTY THOUSAND ($60,000.00) Dollars.

SPECIAL CONDITIONS OF PROBATION—

IT IS FURTHER ADJUDGED that on counts 5, 6 and 7, the imposition of sentence is Hereby Suspended and defendant is placed on probation for a period of FIVE (5) YEARS on the general terms and conditions of probation and on the further condition that defendant render community service (the nature to be determined by the Probation Dept. and approved by the Court) for a period of 125 hours per calendar quarter during the first 2 years of the probationary period. The period of probation imposed on counts 5, 6 and 7 is to run concurrently as to counts 5, 6 and 7 and concurrently with the Special Parole term imposed on counts 1, 2, 3 & 4.

* * * * *

COMMITMENT RECOMMENDATION—

The court orders commitment to the custody of the Attorney General and recommends, that the defendant be incarcerated at the Chicago Metropolitan Correctional Center.

Order the defendant to surrender directly to the Metropolitan Correctional Center on April 27, 1982. Same bond to stand pending surrender.

SIGNED BY
XXX U.S. District Judge /s/ MILTON I. SHADUR
Date March 24, 1982